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No. 81-2351

In the Supreme Court of the United States

October Term, 1982

DAVID W. SCHREFFLER,

Petitioner

v.

PENNSYLVANIA LABOR RELATIONS BOARD;
EASTERN LANCASTER COUNTY SCHOOL DISTRICT;
and
EASTERN LANCASTER COUNTY EDUCATION ASSOCIATION,

Respondents

BRIEF OF RESPONDENT PENNSYLVANIA LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an employe organization, a private entity, which is the exclusive representative for all employes in a bargaining unit, may, consistent with the First and Fourteenth Amendments, limit voting on contract ratification to members of the organization after the opinions and views of non-members have been voiced and taken into account during the ratification process?

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STATUTE:

Public Employe Relations Act, 43 Pa. Stat. Ann. Sec. 1101.101, et seq. (Purdon Supp. 1981), Act of July 23, 1970, P.L. 563, as amended 1, 7, 9, 15, 19

COUNTER-STATEMENT OF THE CASE

Respondent, Pennsylvania Labor Relations Board (PLRB), is compelled to restate the case and facts of the instant controversy as Petitioner has mischaracterized the facts in the Statement of the Case set forth in his Petition for Writ of Certiorari (Petition) and has also deleted several facts pertinent to the Commonwealth Court's disposition of this matter.

The Eastern Lancaster County Education Association (Association) is the certified bargaining representative of certain professional employes of the Eastern Lancaster County School District (School District) pursuant to the provisions of the Public Employe Relations Act, 43 Pa. Stat. Ann. §1101.101, *et seq.* (Purdon Supp. 1981), Act of July 23, 1970, P.L. 563, *as amended* (PERA) (Finding of Fact [FF] 13; R. 202a, 342a). On September 20, 1976, the Association and the School District executed a collective bargaining agreement covering the period from July 1, 1976 through June 30, 1978 (FF 5; R. 359a). The agreement provided that negotiations on wages and fringe benefits would be reopened in 1977. The School District and the Association negotiated the reopener items during the summer of 1977. Pursuant to a tentative agreement reached between the Association and the School District, a meeting was scheduled by the Association for September 6, 1977, to review the terms of the proposed amendment and to consider its ratification (FF 17). A written announcement indicating the time, place and purpose of the meeting was placed in the personal mail box

of each teacher, including that of David Schreffler (Petitioner) (FF 17; R. 271a-273a, 275a-276a, 297a).

Petitioner made no attempt to attend the meeting (FF 11; R. 261a-262a). Petitioner was not an Association member (FF 10; R. 203a) although he had been personally requested to join the Association (R. 271a-272a). All members of the bargaining unit regardless of union membership were served with notice of the meeting (R. 271a-273a, 275a-277a, 299a). Petitioner was *never* told he could not attend the meeting (R. 246a-248a, 300a). Petitioner did not attempt to attend the meeting even though his wife, a non-member of the Association for seven years who is also employed by the School District, attended contract ratification meetings during that period (R. 286a-289a).

At the September 6 ratification meeting, no attempt was made to exclude non-members (R. 286a-289a). One of the purposes of the meeting was to encourage non-members to join (R. 300a). Membership cards were passed out prior to the ratification vote, and non-members were asked to join the Association by signing the cards (R. 299a-300a). Association leaders explained the provisions of the tentative agreement (R. 299a) and an opportunity to ask questions regarding the proposal was given to *all* individuals present at the meeting (FF 14; R. 298a). No attempt was made to limit discussion and questions to Association members and non-members in attendance were permitted to ask questions (R. 298a-299a). Petitioner's claim that he was "precluded from voicing his views on the contract" (Petition at 4) is completely belied by the facts.

A vote was taken among the Association's members at the September 6 meeting resulting in the ratification of the amendment. The vote was approximately one hundred votes to ratify with one dissent (FF 9; R. 203a). The voting procedure was conducted in accordance with the Association's constitution and bylaws (FFs 8 and 9; R. 341a, Article XII). The proposed amendment provided for increased compensation, extended sick leave, and a group dental plan for all members in the bargaining unit. The cost of the dental insurance was to be shared as follows: "The School District shall pay 50% of the members' cost and each member shall pay 50% of the cost." (FF 6; R. 349a)

The amendment to the agreement was formally adopted by the Association and School District on September 8, 1977 (FF 5; R. 202a). Petitioner objected to his inclusion in the dental plan for the reason that he has "good teeth" (R. 266a). Petitioner's stated objection was clearly not based on the fact that he was not allowed to vote on *any* of the negotiated contract benefits, but rather that he did not desire the specific benefit in question (R. 259a-260a, 265a-266a). The School District, over the Petitioner's objection, deducted $1.75 from his October 7, 1977 paycheck for payment of his share of the dental insurance premium. The School District has been deducting $1.31 from each of Petitioner's paychecks for this purpose since January of 1978 (FF 12; R. 244a-245a, 326a). Petitioner subsequently filed charges of unfair practices against the Association and School District pursuant to PERA which are the subject matter of the instant dispute.

Counter-Statement of the Case

The PLRB agrees generally with Petitioner's statement of the proceedings in this matter (Petition at 5-8), with the exception of Petitioner's assertions (1) that he raised the question regarding the alleged violation of his right to petition the government before the Pennsylvania Supreme Court (Petition at 8) and (2) that he raised a constitutional challenge to the "relevant provisions" of PERA (Petition at 11). A reading of the Petition for Allowance of Appeal discloses that reference is made *exclusively* to Petitioner's right of freedom of association. Neither violation of the right to petition the government nor challenge to the constitutionality of any provision of PERA can be found among the stated reasons requesting allowance of appeal.

ARGUMENT

1. The Court below decided the instant dispute in full accord with applicable precedent.

While correctly stating that the Association has a "state law duty to represent all members of the bargaining unit fairly", Petitioner errs in his ultimate claim that the duty of fair representation encompasses a constitutional duty to allow Petitioner to vote on contract ratification. In *Steele v. Louisville and N. R. Co.*, 323 U.S. 192 (1944), this Court stated that in representing union, nonunion and minority employes, a union must represent all employes without discrimination, fairly, impartially and in good faith. The Court went on to state that the union must consider requests and expressions of nonunion members and afford them an opportunity to be heard. As is stated *infra*, this duty of fair representation has been fully adopted in Pennsylvania.

Ratification of a collective bargaining agreement is an internal union matter. *Lear Siegler, Inc. v. International Union, U.A., A. & A.I.W.*, 419 F.2d 534 (6th Cir. 1969); *Houchens Market of Elizabethtown, Inc. v. N.L.R.B.*, 375 F.2d 208 (6th Cir. 1967); *N.L.R.B. v. International Union of Elevator Const., Loc. No. 8*, 465 F.2d 974 (9th Cir. 1972); *Adams Potato Chips, Inc. v. NLRB*, 430 F.2d 90 (6th Cir. 1970), *cert. denied* 401 U.S. 975 (1970); *NLRB v. Raven Industries, Inc.*, 508 F.2d 1289 (8th Cir. 1974).

Argument

Both federal and state courts have refrained from unreasonably extending the duty of fair representation owed nonunion employes to incorporate and include participation in a contract ratification vote which has been regarded as an internal union matter. *Branch 6000 National Association of Letter Carriers v. NLRB*, 595 F.2d 808 (D.C. Cir. 1979); *City of Farmington Hills v. Farmington Hills Police Officers Ass'n*, 79 Mich. App. 581, 262 N.W. 2d 866 (1977); *Daigle v. Jefferson Parish School Board*, 345 So.2d 583 (La. App. Ct. 1977), writ refused 347 So.2d 260 (1977); *Matter of Wald v. Nassau Chapter CSEA*, 340 N.Y.S. 2d 451, 72 Misc. 2d 723 (1973).

The Court below correctly stated that Petitioner's constitutional arguments in effect seek to call into question the collective bargaining process itself. Petitioner's claim that the union's status as exclusive bargaining representative deprives him of his constitutional right to petition the government must fail for several reasons. First, it disregards the compelling state interest in the orderly resolution of labor disputes through collective bargaining. *See, Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944). The authority relied upon by Petitioner (Petition at 9) is factually inapposite and inapplicable to the legal theory advanced by Petitioner. In *City of Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), nonunion employes were prohibited from speaking at a public school board meeting. There is absolutely no contention herein that Petitioner has been denied the opportunity to speak at a school board meeting or otherwise petition the government and, in fact, was

additionally afforded the opportunity to attend and speak his views at union meetings. In *Abood,* this Court stated that public employes are free (with limited exception not relevant here) to participate in the full range of First Amendment rights including rights to vote in general elections and express views at public governmental meetings such as those of the School District.

Petitioner however confuses these rights, which even he does not allege to have been abridged, with the rights and obligations statutorily created which authorize a collective bargaining representative for public employes. Regardless of the existence of a collective bargaining representative, Petitioner retains all of these rights to petition the government. As the Court stated in *Abood,* the differences between public and private sector collective bargaining do not necessarily translate into differences in First Amendment rights. Simply stated, the right to petition the government is not abridged by the existence of a bargaining representative of public employes.

Further, Petitioner's contention that his right to petition the government has been abridged conveniently ignores Section 606 of the PERA, which statutorily mandates the right of individual public employes to present grievances to their public employer and have them adjusted without intervention by the union. See 43 Pa. Stat. Ann. §1101.-606 (Purdon Supp. 1981). There is no evidence that this right has been abridged or that Petitioner has even availed himself of that right. Petitioner also has full access to the contractual grievance procedure protected by the Association's duty of fair representation.

Argument

Petitioner relies upon *Elrod v. Burns*, 427 U.S. 347 (1976), and struggles to reconcile that reliance with this Court's recent decision in *Abood*. In *Elrod* public employes were fired from their employment in violation of their exercise of constitutionally protected rights of freedom of association. In contrast, Petitioner herein has shown no demonstrable impact on his employment as a result of his non-membership in the Association. His public employer, the Eastern Lancaster County School District, has merely abided by the terms of a collective bargaining agreement which included the objectionable contributory group dental insurance plan that had been ratified by a vote of approximately 100 to 1 (Petition, Appendix "C" at 24a). Petitioner desired not to participate in the dental plan because, as he testified, he "has good teeth" (Petition, Appendix "A" at 9a). Petitioner's claim that his First Amendment rights were "significantly impaired" in any sense analogous to those of the discharged employes in *Elrod* is poppycock. Both this Court in *Abood* and the Pennsylvania Supreme Court in deciding PERA appeals have stated that the limited infringement on individual rights implicit in collective bargaining statutes is justified by the compelling state interest in the orderly resolution of public sector labor disputes. *See, PLRB v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975). The PLRB submits that there is no "unresolved tension" between constitutional rights and union representation as suggested by Petitioner. The tension rather is created by the "free rider" (see *Abood)* who is unwilling to accept the consequences of his own decision to refrain from joining the union and sharing the costs of

collective bargaining and who thereby forfeits the rightful role of a contributing member of the organization.[1]

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2. This case presents no significant, unresolved constitutional issues which should occasion this Court's exercise of jurisdiction.

The Petitioner's discussion of *Abood* (Petition at 12-13) is replete with inaccuracies which demonstrate the strained nature of Petitioner's reliance on that decision as well as the fundamental weaknesses in the propositions advanced.

Petitioner begins with the sweeping assertion that this Court, in *Abood* and *Steele*, "has acknowledged that constitutional issues are inherent in the concept of exclusive representation in the labor relations field". This contention does not withstand even a cursory review of the cases cited. The Court's decision in *Steele* is based not upon any constitutional foundation, but exclusively upon *statutory* rights and duties imposed by the Railway Labor Act. 323 U.S. at 202-204. There is neither a hint of nor an allusion to any application of constitutional principles in the Court's opinion. The only reference to the issue of constitutionality is found in the concurring opinion of Mr. Justice MURPHY—a reference which emphasizes that the Court did not deem it appropriate to resolve *Steele* on a constitutional basis.

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[1] Unlike the employes in *Abood*, "public employes" under PERA have the choice of joining or refraining from joining employe organizations under PERA's "maintenance of membership" provisions. See 43 Pa. Stat. Ann. §1101.301(18).

Equally erroneous is Petitioner's claim that *Abood* recognized a cause of action based solely upon an employe's complaint that a state statute authorizing "agency shop" for public employes violated rights protected by the First and Fourteenth Amendments. To the contrary, the Court held in *Abood* that a state statute authorizing agency shop for collective bargaining purposes including contract administration was constitutionally valid.[3] It was only because of allegations that the agency shop fees in *Abood* were being expended for "political purposes" unrelated to collective bargaining that the Court found some merit in the employe's complaint. 431 U.S. at 234. In the instant case, there is no question that the deductions objected to by Petitioner are clearly within the collective bargaining, contract administration arena contemplated by this Court in *Abood*. The concerns of the Court in *Abood* are clearly not present in this matter.

The most egregious error in Petitioner's discussion, however, which refutes the very grounds upon which Petitioner seeks review in this matter, is the assertion that

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[3] The Court noted that the concept of union shop, which had previously been upheld in the context of private sector labor relations, *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), is the practical equivalent of agency shop for purposes of constitutional analysis. 431 U.S. at 217 n. 10. *See, N.L.R.B. v. General Motors*, 373 U.S. 734, 743 (1963). The Court further emphasized that the differences in the nature of collective bargaining between the public and private sectors are not such as to raise the rights of public employes to a higher plane than private employes. 431 U.S. at 229-231. Thus, the Court held that a public sector agency shop clause is valid to the extent that the service charges are used to finance union expenditures related to collective bargaining.

this Court, in footnote 33 of *Abood*, "expressly reserved decision on the question of the exclusive representative's duties to non-union bargaining unit members with respect to collective bargaining." Petition at 12-13. To the contrary, the Court, consistent with a long line of prior decisions, expressly reaffirmed the principle that, in carrying out its duties, "the union is obliged 'fairly and equitably to represent all employees . . ., union and nonunion,' within the relevant unit." 431 U.S. at 221. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Footnote 33 of *Abood*, 431 U.S. at 236, upon which Petitioner so heavily relies, reserves the Court's judgment only in the area of "social activities" which are unrelated to collective bargaining and contract administration and are far removed from the issue raised in the instant matter. The contention that the language contained in this footnote in any manner demonstrates that this Court has reserved judgment on the question of the duty of fair representation as it pertains to collective bargaining is clearly unsupportable in view of the history of the Court's decisions on this issue.

The union's duty of fair representation, firmly established by this Court in the sphere of Federal labor relations, has been adopted in full measure by the PLRB and the Pennsylvania appellate courts. *See, Robinson v. Abington Education Ass'n*, 492 Pa. 218, 423 A.2d 1014 n. 5 (1980); *Hollinger v. Dept. of Public Welfare*, 469 Pa. 358, 369 n. 17, 365 A.2d 1245, 1251 n. 17 (1976); *Cohen v. Temple University of Com.*, Pa. Super.

, 445 A.2d 179, 184-185 (1982); *Fouts v. Allegheny County,* Pa. Commonwealth Ct. , 440 A.2d 698, 701 (1982); *Phoenixville Area School District,* 8 Pennsylvania Public Employee Reporter (PPER) 351 (1977). Indeed, this Court's delineation of the duty of fair representation in *Steele,* which was accorded much weight by the Court of Common Pleas (Petition at 18a), demonstrates that Petitioner's claim herein (i.e., the alleged absence of a standard regarding the duty of fair representation) is meritless:

> "While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."

323 U.S. at 204. When this standard is applied to the facts of the present case, the record is undisputed that all employes, whether members or non-members of the Association, received notice of the September 6, 1977 ratification meeting, that non-members were in attendance, and that non-members were permitted to ask questions following the Association's explanation of the proposed amendments to the contract. It was Petitioner's choice not to attend the ratification meeting when he was clearly

permitted to do so, and not the Association's ratification procedure, which precluded consideration of his views on the contract amendments. Petitioner's contention that he was deprived of an opportunity to communicate his views regarding the terms and conditions of his employment is factually inaccurate. There is no evidence in this record which would indicate that the wishes of non-members were ignored or that their interests were not considered by the Association. Compare the facts herein with *Branch 6000*. The evidence of record fully supports the determination of the PLRB, as affirmed by both reviewing courts, that the Association has met its obligation to represent fairly all members of the bargaining unit. Thus, neither the law nor the facts will support Petitioner's challenge to the Association's actions.

The *only* authority cited by Petitioner to support his position with respect to nonunion bargaining unit members having a right to ratify a contract is *International Brotherhood of Painters v. Anderson*, 401 So.2d 824 (5th Dist. Ct. App. Fla. 1981). As Petitioner must concede, this case was not decided on any constitutional grounds. The relevant state statute, unlike many other state laws such as Pennsylvania's PERA, required ratification by union and nonunion members alike. Contrary to Petitioner's contention, the Florida state court did not resolve any constitutional "conflict" between First and Fourteenth Amendment rights and the concept of exclusive representation by a union, but decided the case solely on the basis of statutory construction.

3. The instant case does not involve "state action".

Accordingly, Petitioner's claims premised upon rights guaranteed by the First and Fourteenth Amendments must fail.

The law is well-settled that the Fourteenth Amendment reaches only those acts which are attributable to a state and not to actions which are private in nature. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349-350 (1974). The premise underlying this limitation is that courts should avoid constitutional review of purely private relationships. *Civil Rights Cases*, 109 U.S. 3 (1883). The instant case asks this Court to consider the constitutionality of a *union's* contract ratification procedure—a procedure which is an internal union matter, unregulated by state statute. The PLRB submits that the facts surrounding the Association's contract ratification procedure do not satisfy any of the criteria established by this Court for determining state action.

As is relevant to this case, the Court has found the presence of state action in cases falling essentially into three groups: (1) where state courts have enforced an agreement affecting private parties; (2) where the state has significantly involved itself in the action of a private party; and (3) where there was private enforcement of a public function. *Flagg Bros., supra*, 436 U.S. at 159-164; *Jackson, supra*, 419 U.S. at 351-358. The requirement that Petitioner become a member of the Association in order to vote on contract ratification is based upon the constitution and bylaws of the Association, a private party. The record discloses that the voting procedure in question

was adpoted by the Association's membership and enforced solely by the Association. There has been no enforcement of the Association's voting requirements by any state agency or court. Compare the facts herein with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state action premised upon state court enforcement of private, racially restrictive covenants against Black purchasers of land) and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (creditor, in addition to pursuing collection of debt by private means permitted by Georgia law, resorted to authority of Georgia court, which subsequently ordered garnishee not to pay over money previously the property of debtor).

Petitioner's attempt to predicate state action upon the fact that the Association is "state-certified" is unsupportable in the law. Petition at 12. The mere fact that Pennsylvania has a body of law which regulates the certification and bargaining obligation of an exclusive bargaining representative is insufficient to constitute state action. *See, Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-176 (1972). For a state to be held responsible for the discriminatory action of a private party, it must be demonstrated that "the State, by its law, has compelled the act." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970). While Section 902 of PERA, 43 Pa. Stat. Ann. §1101.902, *permits* employe organizations in their discretion the option of restricting contract ratification to their membership, it does not *compel* such practice. The absence of state-compelled enforcement clearly removes the Association's voting procedure from the claim of state action. This Court's decision in *Jackson* is dispositive on this issue:

> "Approval by a state utility commission . . ., where the commission has not put its weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' . . . Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the state, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment."

419 U.S. at 357. *See, Flagg Bros., supra*, 436 U.S. at 165. The absence of state-compelled action in the instant case renders Petitioner's reliance on *City of Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), misplaced.

Also unsupportable is Petitioner's suggestion that state action may be found because Petitioner has been denied the relief sought before the PLRB and the reviewing courts. Petition at 13. As this Court aptly stated in *Flagg Bros.:*

> "If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.
>
> Not only is this notion completely contrary to 'essential dichotomy,' Jackson, supra, 419 U.S. at 349, between public and private acts, but it has been previously rejected by this Court."

436 U.S. at 165.

In sum, since no enforcement action has been taken by state officials or courts regarding the Association's

voting requirements, the disputed voting practice does not fall within the first category of state action.

Similarly, the state has not significantly involved itself with the private party, the Association, in this matter. The Association's voting practice was not compelled or directed by the state, nor did the Association and the state participate in a joint activity. *See, e.g., Adickes, supra,* 398 U.S. at 170-174 (state process of arrest used to enforce state custom of racial segregation in public eating places); *Fuentes v. Shevin,* 407 U.S. 67 (1972) (state seizure of debtor's private property prior to hearing determining validity of creditor's claims). This second category of state action is typically found when state officials, in an extensively regulated industry, have put their weight behind the challenged private act. *See, Burton v. Wilmington Parking Authority,* 365 U.S. 715, 725 (1961); *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 n. 8, and the Court's discussion in *Jackson, supra,* 419 U.S. at 357. Such is not the case herein.

The third category of state action involves "the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson, supra,* 419 U.S. at 352. *See, e.g., Terry v. Adams,* 345 U.S. 461 (1953) (voters' associations racially discriminatory practice affecting public elections); *Marsh v. Alabama,* 326 U.S. 501 (1946) (company town performing all functions of municipality). This Court has set forth the following test for determining state action in this context:

> "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the

> action of the latter may be fairly treated as that of the State itself."

Jackson, supra, 419 U.S. at 351. The suggestion that the action of an employe organization in conducting a contract ratification vote can be treated as an action of the state, or that such action constitutes a function "traditionally exclusively reserved to the State", is patently untenable.

For all the foregoing reasons, the lack of state action in the instant case denies the existence of a constitutional question.

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4. Petitioner did not raise the question of an alleged deprivation of his right to petition the government before the Pennsylvania Supreme Court and is therefore precluded from raising said issue before this Court.

United States Supreme Court Rule 21.1 (h) requires that Petitioner specify the stage of the proceedings and the manner in which the question sought to be reviewed has been raised and preserved. While Petitioner claims that the question of his right to petition the government was raised before the Pennsylvania Supreme Court (Petition at 8), Petitioner fails to specify where in the record and in what manner the question was preserved. The reason for Petitioner's failure to comply with Rule 21.1 (h) in this particular is because the question of Petitioner's right to petition the government was not raised in the Petition for Allowance of Appeal filed with the Pennsylvania Supreme Court. A reading of the Petition for Allowance of Appeal (p. 8) discloses that Petitioner's claim was limited solely to the question of freedom of

association. Petitioner did not preserve the question involving his right to petition the government before the Pennsylvania Supreme Court, thus depriving this Court of jurisdiction on this issue.

Likewise, Petitioner's attempt to call into question the constitutionality of PERA (Petition at 11) must fail insofar as Petitioner did not properly preserve this issue in the state appellate courts. Petitioner presumably seeks to challenge the constitutionality of Section 902 of PERA (43 Pa. Stat. Ann. §1101.902 (Purdon Supp. 1981)) concerning contract ratification. The question of the constitutionality of Section 902 was not raised in the Petition for Review filed in the Court of Common Pleas of Lancaster County (R. 371-41a) and was, at best, vaguely alluded to in the Petition filed in the Pennsylvania Supreme Court. Petitioner's failure to properly preserve this issue precludes its consideration by this Court.

CONCLUSION

The Respondent, PLRB submits that a writ of certiorari should not be granted in this matter for the following reasons:

1. The Petitioner's brief is replete with inaccuracies (with regard to both the facts and the law) which, under United States Supreme Court Rule 21.5, is sufficient reason for denial of the Petition.

2. Petitioner did not properly preserve either the question of an alleged deprivation of his right to petition the government or the constitutionality of PERA, Section 902, in the state appellate courts, thus depriving this Court of jurisdiction over these issues.

3. Petitioner has failed to set forth any factual or legal basis to support a claim of denial of his right to petition the government.

4. Petitioner's claim involving alleged violations of rights derived from the First Amendment by application of the Fourteenth Amendment must fail in the absence of any demonstrated state action.

5. There are no special and important reasons for the issuance of a writ in this matter as contemplated by United States Supreme Court Rule 17. Contrary to Petitioner's contention, the issue of the duty of fair representation to nonunion employes has been addressed by this Court. The facts of record demonstrate that the Association herein has fully complied with its duty fairly to represent Petitioner.

6. Petitioner's claim that he has been denied his right of freedom of association is completely refuted by the facts of record. The authority relied upon by Petitioner is factually inapposite and inapplicable to the legal theory advanced. Petitioner was given a full opportunity by the Association to voice his opinions and to ask questions at the contract ratification meeting.

Wherefore, the Pennsylvania Labor Relations Board respectfully requests that certiorari be denied.

Respectfully submitted,
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